

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

C. F. LYTHE Co., an Iowa corporation, GREEN CONSTRUCTION CO., an Iowa corporation, UNITED STATES FIDELITY AND GUARANTY COMPANY, a Maryland corporation, and AMERICAN SURETY COMPANY OF NEW YORK, a New York corporation, *Appellants*,

vs.

C. M. WHIPPLE, Deputy United States Compensation Commissioner, for the Fourteenth Compensation District, and CLARK NUTT, Guardian of Phyllis Elaine Nutt, Kenneth James Nutt and Raymond Albert Nutt, children of William Earnest Nutt, deceased, *Appellees*.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLANTS

MERRITT, SUMMERS, BUCEY & STAFFORD,
Proctors for Appellants.

Office and P.O. Address:
840 Central Building,
Seattle 4, Washington.

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Elaine Nutt, Kenneth James Nutt, and
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liam Earnest Nutt, deceased,
Appellees.

No. 11217

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLANTS

BASIS OF JURISDICTION

This is a proceeding in which appellants seek to have suspended and set aside a compensation order and award of compensation made and filed by the Deputy Commissioner for the Fourteenth Compensation District of the United States Employees' Compensation Commission as more particularly set forth in

the libel of appellants (R. 2-7). The jurisdiction of the United States District Court and of the United States Circuit Court of Appeals for the Ninth Circuit is sustained by Section 21 of Public Law 803 of the 69th United States Congress, as amended by Section 3(b) of Public Law 208 of the 77th United States Congress, as amended, which statutes are set forth in Title 33 U.S.C.A., Sec. 921 and in Title 42 U.S.C.A., Sec. 1653(b). Also in support of appellants' position that this court has jurisdiction appellants cite *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 103 F. (2d) 513; *Kobilkin v. Pillsbury*, 103 F.(2d) 667, affirmed by an equally divided court in *Kobilkin v. Pillsbury*, 309 U.S. 619, 60 S. Ct. 465 (petition for rehearing denied in 309 U.S. 695, 60 S. Ct. 584).

STATEMENT OF THE CASE

During the evening of June 26, 1942, William Earnest Nutt, an employee of appellants C. F. Lytle Co. and Green Construction Co., left a roadhouse near Big Delta, Alaska. He was one of three passengers riding in the open dump body of one of his employer's trucks. He was intoxicated. Shortly thereafter, and during the ride, he sustained fatal injuries. Minor children of William Earnest Nutt, acting through their guardian, filed in the office of the United States Employees' Compensation Commission for the Fourteenth Compensation District at Seattle, C. M. Whipple, Deputy Commissioner, a claim for compensation on account of the death of William Earnest Nutt under the provisions of Public Law 208 of the 77th United States Congress, Act of August 16, 1941, as amended (42 U.S.C.A. Sec. 1651). Proceedings on that claim before the Deputy Commissioner resulted in the filing by the Deputy Commissioner on July 3, 1945, of a compensation order and award of compensation favorable to the claimants and unfavorable to the employer and carrier named in the claim who are appellants here.

The questions involved in this appeal are these:

- (1) Is there any substantial evidence in the record, upon which the compensation order herein complained of is based, that the death of William Earnest Nutt arose out of and in the course of his employment?
- (2) Does that record affirmatively establish, so as not to permit any conflicting inference, that the death

of William Earnest Nutt was occasioned solely by his intoxication?

These questions were brought before the District Court by appropriate proceedings for review of the compensation order of July 3, 1945, under and according to the provisions of Section 3(b) of Public Law 208 of the 77th United States Congress, as amended (Title 42 U.S.C.A., Sec. 1653(b)), and Section 21(b) of Public Law 803 of the 69th United States Congress, as amended (Title 33 U.S.C.A., Sec. 921(b)), and as extended by said Public Law 208.

SPECIFICATION OF ERRORS RELIED UPON

Appellants rely upon assigned errors Nos. (1), (2), (3), and (4), which are set forth on pages 115 and 116 of the Apostles on Appeal.

ARGUMENT OF THE CASE

It is the position of the appellants that the compensation order and award of compensation of July 3, 1945, for the review of which this suit has been brought, is not in accordance with law

“Because the record upon which the compensation order and award of compensation is based contains no substantial evidence that the death of William Earnest Nutt arose out of and in the course of his employment, and because the same record establishes affirmatively that the death of William Earnest Nutt was occasioned solely by the intoxication of said William Earnest Nutt.”

(Art. VII, Libel, R. 5, 6)

To obtain clarity and to avoid repetition appellants do not segregate their argument in respect of assigned errors (1) and (2) which are:

(1) The court erred in finding, concluding and holding that the record of the proceedings before the Deputy United States Compensation Commissioner contained substantial evidence that the death of William Earnest Nutt arose out of and in the course of his employment; and in failing to find, conclude and hold the contrary (R. 115).

(2) The court erred in finding, concluding and holding that said record did not affirmatively establish, so as not to permit any conflicting inference, that the death of William Earnest Nutt was occasioned solely by his intoxication; and in failing to find, conclude and hold the contrary (R. 115).

The Deputy Commissioner’s compensation order

award of compensation of July 3, 1945, contains specific findings by the Deputy Commissioner

"that deceased became intoxicated early in the evening" and "that deceased was in a happy stage of intoxication." (R. 101)

Appellants omit as needless exercise the detailing of the more than ample evidence from which the Commissioner made those findings; no question is raised regarding those findings on this appeal.

This review must begin, therefore, with the acceptance as facts that the deceased became intoxicated early in the evening of June 26, 1942 (the date on which he met his death (R. 101)), and that he was intoxicated during the ride which resulted in his death.

The Commissioner, having found as a fact that the deceased was intoxicated at the time of the accident which resulted in his death, would logically be expected to make findings in respect of the questions:

(a) Was the decedent's death due to a peril or risk involved in or incidental to the deceased's employment or to the conditions under which deceased's employment was required to be performed, and

(b) Was the decedent's death due solely to decedent's intoxication?

With all respect, appellants suggest that the Commissioner failed to give due consideration to these, and particularly to the first of these questions. The language of the Commissioner's compensation order award of compensation (R. 99) when read in its entirety in the light of the record leaves the impres-

sion that the Commissioner assumed that the deceased was in the course of his employment when he left the roadhouse in the truck; that the deceased's actions in standing up in the truck (R. 39, 52) and in stepping over the side of the truck (R. 39) did not constitute any departure by deceased from the course of his employment; that the deceased's statements, which were coincidental with his standing up in and stepping from the truck, that there was a moose out there (R. 39) and "Let's get out and walk" (R. 39) did not manifest any intent on the part of deceased to embark on a venture of his own; most importantly, that as long as deceased was in his employer's truck, regardless of how outrageously he might have conducted himself, he remained in the course of his employment, and, therefore, that the only question which the Commissioner had to decide was whether he voluntarily stepped or jumped from the truck or was thrown from the truck by reason of a bump or jolt.

While it is the view of appellants that the question whether he stepped or jumped from the truck or was bounced out of the truck is not controlling, appellants regard an analysis of the Commissioner's and of the District Court's dispositions of that question as useful and necessary in this brief.

Keeping in mind that the deceased was intoxicated during the entire period which elapsed between the time the truck upon which he was riding left the roadhouse and the time at which deceased met his death, we respectfully ask the court critically to examine the fol-

lowing portion of the Commissioner's findings and the evidence in this record which is relevant to this portion of the findings. The findings are these:

"* * * that when about four miles from the barracks and while deceased was standing in the body of the truck, one of the wheels struck either a hole in the road or an obstruction, catapulting the deceased over the side of the truck; that he landed first on his feet and then slid forward about twenty feet; that neither of the rear wheels struck the deceased; that the deceased died from a broken neck almost instantly * * *." (R. 101)

Separated for the purpose of this examination the important facts contained in this language are these:

- (a) Deceased was standing in the body of the truck;
- (b) One of the wheels struck either a hole in the road or an obstruction;
- (c) Deceased was catapulted over the side of the truck by reason of the wheel so striking;
- (d) Deceased landed first on his feet.

There are to be noticed some facts established without dispute in the record in respect of which no reference or finding is made by the Commissioner. We refer to the description of the truck given by United States Marshal Buckley which is contained in this record (R. 32). Mr. Buckley states that the truck was a dump truck with a dump box on the rear; that the floor of the box was about four feet off the ground; that the sides of the box rose about eighteen inches above the floor of the box. We refer also to some facts contained in the testimony of Ray Johnston, which we

regard of controlling importance, which will be discussed in detail herein.

Most important of all is the fact that, although there were six men riding in the truck, including the driver, only one of these men saw the accident occur. He was Ray Johnston. Messrs. Brown and Welchell were riding in the cab of the truck. Welchell says that he did not see the accident happen, but that two minutes earlier he looked back and that “* * * they were all laughing and talking * * *” (R. 27); Brown testified that “* * * a few minutes before the truck stopped I glanced back and saw Ernie (the deceased) standing up in the truck * * *” (R. 52); Berg knew nothing of the accident happening; Jack Johnston, although he was not in the cab but in the dump box, testified that he was not looking at the time, did not see the accident and that the first he knew of the accident was when he saw the deceased as the latter was rolling along the ground behind the truck. This means that the only direct evidence—in fact the only evidence, direct or circumstantial, which this record contains relating to the manner of the happening of this accident, is the testimony of Ray Johnston.

The testimony of Ray Johnston is of such importance in this case that appellants deem it advisable to set it forth in full. It should be noted that his testimony was given in response to oral interrogatories propounded by Mr. Harry O. Arend, Assistant United States Attorney at Fairbanks, Alaska, during a formal Coroner's inquest upon the body of William Ernest Nutt, deceased, and also in response to questions propounded by the Coroner's jury and the Coroner

himself. The testimony of Ray Johnston (R. 37) follows:

"RAY JOHNSTON, being first duly sworn, testified as follows:

Q State your full name?

A Ray Edward Johnston.

Q Where do you live, Mr. Johnston?

A Guernsey, Iowa.

Q Where are you temporarily residing?

A At Lytle and Green, Big Delta.

Q Were you acquainted with William Ernest Nutt?

A Yes, sir.

Q How long had you known him?

A Well, for the length of his stay out there—between 3 and 4 weeks.

Q Did you see him last Friday, June 26th?

A Yes, sir.

Q Where did you see him at that time?

A The last time I seen him—you mean alive?

Q Yes.

A Was getting out of the truck.

Q Where at?

A Four or five miles North or South of Big Delta.

Q At that time you saw him get out of the truck. What kind of truck?

A V-8 dump truck. About a 39 or 40.

Q Who all was in the truck?

A There were five of us. Otto Berg, Jimmy Brown, Harold Johnston, Carl—I don't know Carl's last name—no, Walter. And myself.

Q Where were you sitting at the time?

A I was sitting in the left hand corner in the back of the truck on the floor.

Q Who else was in the back?

A Harold Johnston was sitting in the back and Ernie was sitting in the right side.

Q Is Harold related to you?

A My brother.

Q Do they call him Jack?

A That's right.

Q Who was in the front? Who was driving?

A Otto Berg was driving.

Q Who was with him up in front?

A Otto was driving and there was Walter and Jimmy Brown.

Q How did Nutt get out of the car—truck?

A He raised up and just stepped out—whether accidentally or how—but that's how he done it.

Q You say he stepped out?

A That's right.

Q Did he have to make any effort?

A No.

Q Did you see him get up and get out?

A Yes, sir.

Q Will you demonstrate just how he did it?

A He just got up and raised his foot over like that (demonstrating) and said, 'Let's get out and walk.' I thought he was joking and didn't think he meant it.

Q How fast was the car going?

A I wouldn't think over 15 miles an hour.

Q Did he make any other statement right at the time or just before?

A Yes. He said just before that he saw a moose down there and said 'Let's go get it.' I

pushed him back and said 'These are rough roads. You'll fall out,' and didn't think anything more of it.

Q What did you do after he stepped out?

A I jumped out of the back end and went back where he was lying.

Q Did the car keep on going?

A For a slight ways, yes.

Q What did you find?

A He was lying there on his back. I started to give him artificial respiration. I thought he had his breath knocked out.

Q Did he hit himself on any part of the truck?

A Not that I seen.

Q Did you feel anything when he left the truck?

A No, I didn't. When he left I grabbed the back end and jumped out.

Q Can you give any reason for him acting like this?

A No. Any more than just joking.

Q Had he been drinking?

A Slightly.

Q Was he drunk?

A I wouldn't say that he was, no.

Q Is there anything you can add that would make it easier for the jury to determine the actual cause of the death?

A I don't know what it would be.

Q Did he seem to have any financial worries?

A He was happy and laughing when he done that.

Q Had you ever observed him drinking before that?

A I don't believe I ever have.

Q He had never been drunk in your presence?

A No.

Q Do you think in your own mind that he knew what he was doing?

A I think he knew what he was doing but I think he was just joking. I don't think he intended to go that far.

QUESTION BY JURY: Do you think when he stepped over the edge of the truck body he apparently thought that he would step out on the ground—was he in that sort of mental condition—so that his body could have turned over?

A I don't think he figured on letting his foot go down there that far.

Q He would have a tendency of stepping over the edge to bring him in a sort of revolving motion and the wheel might catch him if he was far enough ahead of the hind wheel? Were there any chains on the side of the truck?

A I don't think there was. I don't believe there was a chain hanging on the side of the truck.

QUESTION BY CORONER: When he went over the side you saw him clear the bed of the truck?

A Yes.

Q He didn't hang to the truck?

A He went real quick. I jumped out at the same time because I knew he had been hurt.

QUESTION BY JURY: When he hit the ground did he hit with his feet?

A I thought he hit with his feet and then rolled over on his shoulder and head.

MR. AREND: If he stepped out of there how did he happen to hit the ground so as to make an impression of both feet?

A It is quite a ways from the side of the truck to the ground. It is several feet down. Those things happen so quick it is hard for a person to see."

Second in importance only to the testimony of Ray Johnston is the testimony of John J. Buckley, Chief Deputy United States Marshal for the Fourth Judicial Division of the Territory of Alaska. That testimony (R. 32), which was given at the same inquest as that at which the testimony of Ray Johnston was given, follows:

"JOHN J. BUCKLEY, being first duly sworn, testified as follows:

Q Your name is John J. Buckley?

A Yes, sir.

Q You are the Chief Deputy Marshal for this Division?

A Yes, sir.

Q Were you acquainted with William Ernest Nutt?

A No, I wasn't. Not until after his death.

Q Did you see his body after his death?

A Yes, sir.

Q On what day?

A On Saturday. Last Saturday, June 27th.

Q At what time?

A About 3 o'clock A. M.

Q Where?

A About 3 miles south of Big Delta on the Richardson Highway.

Q In what kind of surroundings?

A He was laying in the road with his feet toward the bank of the road, lying on the shoulder

of the road with his head quite close to the travel marks on the road. As a matter of fact, it was right on the edge of the travel wear of the road. Lying with his face looking towards the woods on the right hand side of the road going out.

Q Were his feet pointing to Fairbanks or towards Valdez?

A Right at that spot I don't know the directions but he was on the right hand side of the road with his feet pointing toward the ditch.

Q Right hand?

A He was lying this way (motioning) with his feet toward the ditch. Right on the shoulder.

Q More cross ways of the road?

A He was directly across the road.

Q Any part of his body in the road bed?

A His head was on the outside of the regular travel of the road.

Q Just outside?

A You would have to turn out around him to get around. There were marks there where cars had traveled.

Q Was anyone else there?

A Jim Brown and Ray Johnston and the book-keeper for Lytle and Green. I don't recall his name.

Q Did anyone else go out with you?

A Mr. Growden, U. S. Commissioner and I and Patrolman Buster Anderson.

Q Did you make an inquiry there as to the cause of this man's death?

A Yes.

Q What did you find?

A I found out from Ray Johnston who was

watching the body that they had been down to Big Delta and I found out later that they had been sent to Big Delta by the foreman to make some repairs on the boat which they had done and had been scheduled to go home about 8 or 8:30 in the evening. A man by the name of Otto Berg wasn't going back until later and these men, Nutt and the two Johnston brothers and one other decided to stay there and wait for Otto Berg. They had been drinking considerable and my information was that Nutt had drunk very heavily and had passed out. They put him in bed and he got up and seemed to be all right—got into the truck by himself and the three of them sat in the truck with their backs toward the cab. They traveled about three miles to where the body was when Ray Johnston said that Ernest Nutt made the remarks: 'There's a moose out there. Here's where I get off.' The next thing they knew he was gone, whether he fell out or jumped out. Johnston wasn't altogether sober. It appears that the ground at the point where he hit the ground was on a straight of way after they had gone around a small curve and had got out into the straight of way on the road and traveled 200 feet from the curve, and showed marks where he hit the ground apparently with his feet spread out. You could see where the ground was broke, and then evidently he went over on his head and face and slid on the ground. His right shoulder had a little bruise. His left side was all bruised and scratched and along his face where the flesh had hit, the gravel was ground into the side of his face. The body was warm when we got there. Both the Commissioner and myself looked for wounds on the body—picked up his head and I believe—we were certain his neck was broken.

because the neck was twisted around as though there was nothing there to hold it and we could feel what we thought was a broken vertebra—about the fourth vertebra from the skull. There was no other marks on the body except the evidence that he slid. I stepped that off from the place where he hit and the body had not been disturbed and it was about 20 feet. Otto Berg was questioned as to what speed he was traveling when he went around the curve and he said between 20 and 25 miles, and that was possible. After he got around this curve he felt the dual tire jump up in the air and strike the ground again. He stopped the car. He didn't know at the time that Nutt had gone over. He was of the opinion that the dual tire on the right hand side of the car struck Nutt when he went over. The examination of the truck we made, the position Nutt was sitting, he couldn't have jumped out of the truck and been hit by the wheels. The car would be by him when he hit the ground. But that might be explained—that jar might be explained that when he got up he had to spring from the bottom of the truck to get out and he might have thought that was the jar. The clothing—he had on a slicker—one of these oil slickers—the marks on his left arm showed no imprint of any tire. Neither did his face or head or chest. You could see no marks at all of tire treads.

Q Did you see the truck they were driving in?

A Yes.

Q Was there any possibility to fall between the body and the back of the cab?

A No. The bed of the truck —

Q You saw no evidence of tire marks on the body and in your opinion it wouldn't have been

possible for him to fall under the back wheels if he jumped out?

A If he jumped it would have been utterly impossible for him to strike the rear wheel. That was my opinion anyway because the truck bed is quite high—I think it is about four feet from the ground to the bottom of the bed of the truck then it has a ten-inch high box on it and above that a piece of wood to extend the box up higher. He would have to jump at least eighteen inches to spring over to get away from it. By the time he hit the ground the truck would be by him.

Q Did you see any evidence of foul play?

A No.

QUESTION BY JURY: You think he went over the side of the truck?

A He had to go out the side of the truck. The position showed that the first marks were on the right hand side outside the travel of the cars.

Q You think he had been draggad?

A I know he had been draggad—he skidded along the road.

MR. AREND: He was draggad by his own force?

A After he hit the ground, he collapsed, turned over and slid. Mr. Berg, who was driving the truck at the time, is almost certain in his own mind that the dual tire went over him, but there is no evidence that we can see and we looked for that after we talked to Berg, and we couldn't see any marks of the tire.

Q Were any bones broken?

A We couldn't find any. Only the neck. I tried his right ankle, the one he hit the ground with. There was no crunching of the bones and no fracture that we could feel."

Dr. A. J. Schaible testified at the inquest that the deceased was in the neighborhood of six feet tall and was quite muscular (R. 31).

According to Ray Johnston, Earnest Nutt was standing on the floor of the truck when he jumped or stepped from the truck (R. 39). Because of the height of the sides of the truck body or dump box, according to Deputy Marshal Buckley (R. 36, 37), a person or object resting on the floor of the dump box of the truck would have to rise or be raised at least eighteen inches in order to clear the side of the dump box so as to leave the dump box in that manner. The road was smooth at the place where the death occurred, according to Walter Welchell (R. 27), and according to Jack Johnston (R. 49). The only other testimony regarding the condition of the road was given by Robert L. Nine by deposition, which is a part of the record herein (R. 83-98). In that deposition Mr. Nine testified that the road was wet and rutted, but at no point in the deposition does he state that these conditions existed at the point where the accident occurred; although it was five hours after the accident before Mr. Nine arrived at the scene of the accident, he nevertheless felt justified in volunteering his opinion "that as the truck rounded the curve it hit a chuck hole and the deceased was thrown out on the ground" (R. 95). However, in answer to Interrogatory 34 in his deposition Mr. Nine seems to have forgotten that opinion, because in answer to Interrogatory 34 he says that when he arrived at the scene of the accident the body was about 500 feet past the curve (R. 90). All of the testimony given on the point by witnesses

who were present at the time of the accident or who came up before the body had been moved fixed the point of the accident as about two hundred feet past the curve. Mr. Nine alone fixes the point at which the body came to rest at five hundred feet past the curve. It is proper to assume that his statement that the road was wet and rutted was made with reference to a point or area five hundred feet beyond the curve; his testimony is valueless in respect of the condition of the road two hundred feet beyond the curve, particularly in the light of the positive statements of the other witnesses that the road was smooth at the point where the accident occurred. Mr. Nine relinquishes all claim to credibility when he says that the deceased could have been thrown out of the truck as it rounded the curve so that the body would come to rest 500 feet beyond the curve.

The Commission has found as facts that one of the wheels struck either a hole in the road or an obstruction with such force as to "catapult" the muscular six-foot decedent, who was standing in the dump box of the truck, over the eighteen-inch high side of the truck, in a direction at right angles to the direction in which the truck was travelling, in such a manner that the decedent landed with both feet striking the road bed simultaneously (R. 101). This means obviously that the force of the bump was sufficiently great either (a) to throw the decedent straight up in the air from a standing position inside the truck until his feet were more than eighteen inches above the floor level, then to the right so as to clear the side of the truck body and the rear wheel, then downward to the ground so

as to permit the decedent to land with both feet striking simultaneously on the road bed on the right side of the road; or (b) to throw the decedent outward over the right side of the truck body and in such a manner as to permit him (a man six feet tall) to make a complete somersault in a space five feet above the ground so as to land with both feet striking the road bed simultaneously and with the direction of his fall still at right angles to the direction in which the truck was travelling.

Appellants submit that the foregoing analysis of the Commissioner's treatment of the question whether the deceased stepped or jumped from the truck or was bounced out of the truck shows that there was no substantial evidence before the Commissioner from which he could have made the finding which he did make on this question. The analysis seems also to show that the Commissioner regarded that one question as controlling and, as will be shown later in this brief, appellants respectfully submit that the District Court seems to have followed the Commissioner in that mistaken view.

Actually, of course, the findings of the Commissioner as affirmed by the District Court which appellants are attacking in this proceeding are the findings that the fatal injury arose out of and in the course of deceased's employment and was not due solely to the deceased's intoxication.

In order for these findings to be left undisturbed by this Court this Court must hold that the record before the Commissioner contained substantial evidence

from which the Commissioner could have made those findings.

In *Avignone Freres, Inc., v. Cardillo* (U.S.C.A. D.C. 1940) 117 F.(2d) 385, the court said:

"Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" (Citing *Consolidated Edison Company v. National Labor Relations Board*, 305 U.S. 197, 229, 59 S. Ct. 206, 217, 83 L.ed. 126)

Avignone Freres, Inc., v. Cardillo, 117 F. (2d) 385, 386.

What relevant evidence is there in this record which could be accepted by a reasonable mind as adequate to support those findings of the Commissioner in this case?

In order for the Commissioner to find that the death of William Earnest Nutt arose out of and in the course of his employment it was necessary for the Commissioner to find that the death of William Earnest Nutt resulted from a peril or risk involved in or incidental to his employment or to the conditions under which his employment was required to be performed.

Specifically what was the risk or peril to which the deceased was exposed and because of which he met his death? It was the persistence of the deceased in standing up in the body of the truck after he had been warned of the danger of doing so (R. 39, 52) and his act of stepping out of the truck (R. 39). Clearly, neither his employment directly nor his employment indirectly through the incident of his transporta-

tion exposed him to any such peril. Up to the time the deceased stood up in the truck the deceased was seated in complete safety in the truck with his back toward the cab (R. 34, 38, 52). The case would be somewhat different if the truck in which he was being transported had been so crowded as to require him to stand, although it would be difficult even then to find evidence in this record which would reasonably justify an inference that the slight jolt or bump to which Otto Berg testified could have thrown the deceased from the truck in the manner in which he did leave the truck.

Ray Johnston (R. 40) and Jack Johnston (R. 48), who were riding in the dump box of the truck with the deceased, stated that they felt no jolt or jar or bump, that they felt "nothing"; Brown said that just before the truck stopped there was a sort of bump or jar and that he could not associate the jolt with anything and that he could not say that it was a bump in the road (R. 52, 53); Berg, who was driving, said he stopped the truck because he knew something had happened, that there was a jolt or a bounce, that what it was he didn't know, that it was like the truck made a jolt like it had run over a rock (R. 44); Welchell testified that he felt a jar in the truck and thought the truck must have hit something or bumped under the hind wheel (R. 27); Deputy Marshal Buckley thought that the jar was explained by the spring from the bottom of the truck which deceased must have made in order to clear the side of the truck (R. 36); Ray Johnston jumped from the truck immediately after the deceased left the truck so that the departure of the two men

must certainly have so lightened the load in the truck as to be noticeable to those in the cab (R. 40).

It simply is not reasonable to believe that the jolt or jar described by the men who were in the cab of the truck and which was not felt at all by the Johnston brothers, who were in the body of the truck, could have been of sufficient force so as to throw the six-foot muscular (R. 31) deceased from a standing position on the floor of the truck over the right side of the truck and at right angles to the direction in which the truck was travelling so as to cause him to strike the road in the manner in which the Commissioner finds he did strike the road. Appellants regard the finding that deceased was catapulted over the side of the truck because one wheel struck a hole or obstruction as unreasonable and as not being supported by any substantial evidence because it involves a rejection of a physical law—assuming that the deceased did not step or jump from the truck but was standing in the truck (R. 101), it is submitted that no ordinary jolt or jar resulting from one of the wheels striking either a hole in the road or an obstruction could have thrown the deceased over the side of the truck at right angles to the line of travel so that he would land on both feet simultaneously *and then slide forward* (in the direction of travel of the truck) twenty feet; whereas, it is not only a reasonable but practically a necessary conclusion that if the deceased jumped or stepped from the truck as Ray Johnston, the only eye witness, says he did, he would land on both feet and would then fall and slide forward in the direction in which the

truck was travelling, just as a person leaving a moving street car or train would do.

It is notable that all of the physical facts which appear in this record regarding the position and condition of the deceased's body after the accident confirm and verify the testimony of Ray Johnston and are at odds with the findings of the Commissioner.

Appellants call particular attention to the oral decision of Judge Bowen which is set forth on pages 111, 112 and 113 of the Record. Judge Bowen's views on the merits are set forth in two paragraphs of that decision.

"I do not hesitate to say that I feel that the Deputy Commissioner made a mistake in arriving at the decision and conclusions announced by him, but I am unable to say that as a matter of law there is no substantial evidence to support the action of the Deputy Commissioner. On the contrary, I am inclined to think there is some substantial evidence to support the Deputy Commissioner, notably the testimony of witness Berg, the truck driver, that he felt a jarring of the truck at the time of the accident, and for that reason it seems to me under the statute this Court is without authority to change the result arrived at by the Depuy Commissioner.

"I repeat, however, that I think the Commissioner made a mistake. I think in view of the testimony of Ray Johnston as to what took place in respect to those things connected with the accident, that the more direct and positive proof in this case is more convincing that the decedent, while in a partially intoxicated condition and in a spirit of playfulness or bravado or acting under

alcoholic stimulant, stepped out of that truck, himself, and that he was not thrown out of the truck by any jarring of the truck caused by rough roads. That is what I think about it, but I assume from the statute that my thought in the matter is of no concern in view of the fact that this Court cannot hold as a matter of law that there is no substantial evidence to support the Deputy Commissioner's action."

While it is interesting to note that the District Court recognized the difficulty of agreeing with the Commissioner in respect of the Commissioner's finding that the deceased was catapulted over the side of the truck by any jolt or jar, it is more important to note that both the Deputy Commissioner and the District Court failed to deal with one of the two controlling questions raised in this controversy.

The compensation order award of compensation (R. 99) and the District Court's oral decision (R. 111, 112, 113) contained no language indicating that any consideration was given to the question whether the death resulted from exposure to a peril involved in or incidental to the employment of the deceased or to the conditions under which that employment was required to be performed.

The District Court's decision is also silent in respect of the question whether or not the death was due solely to intoxication of the deceased.

Let us assume, without conceding, that the District Court was correct in holding that the record before the Deputy Commissioner did contain some substantial evidence in support of the Deputy Commissioner's finding that a jolt or bump occurred which was of

sufficient violence to catapult the deceased over the side of the truck and onto the roadway. It is the position of the appellants that such a holding, even if correct, could not by itself justify the District Court's decision that the Deputy Commissioner's compensation order award of compensation of July 3, 1945, was in accordance with law; it was necessary for the District Court first to find that the record before the Deputy Commissioner contained substantial evidence that the death of William Earnest Nutt arose out of and in the course of his employment, and further that the same record failed affirmatively to establish that the death of William Earnest Nutt was occasioned solely by his intoxication. If the District Court could not make *both* of these findings, the District Court could not correctly hold that the compensation order award of compensation was in accordance with law.

Appellants submit that both the Deputy Commissioner and the District Court failed to recognize (a) that it was William Earnest Nutt's departure from the course of his employment in standing in the truck and in indulging in the conduct which this record clearly discloses which alone placed him in a position of peril and (b) that it is unreasonable to believe that William Earnest Nutt would have so conducted himself if he were not in an intoxicated condition.

Appellants hasten to point out that it was not necessary for the District Court and it is not necessary for this court to hold with appellants on both of these propositions. If appellants are correct in asserting that the peril to which William Earnest Nutt exposed himself as a result of which he died was a peril cre-

ated by his own departure from the course of his employment or was a peril which was not incidental to his employment or the conditions under which his employment was to be performed, then the decision of this case should be in favor of appellants regardless of the finding which the court may make in respect of the question of intoxication.

An injury cannot be said to arise out of the employment unless it occurs in the course of the employment and as the result of a risk involved in or incidental to the employment or to the conditions under which it is required to be performed; the fact that the injury is contemporaneous or coincident with employment is not alone a sufficient basis for an award.

Fazio v. Cardillo (U.S.C.A. D.C.) 109 F. (2d) 835, 836.

Assuming that William Earnest Nutt was in the course of his employment when he left Rika's road-house in appellants' truck (R. 100, 101) it would seem logical, if not inevitable, that this inquiry should proceed to a determination of the question whether his transportation in that truck exposed him to a risk or peril which caused his death.

Six men, including the driver, were riding in the truck; three of them, including the deceased, were riding in the back or truck body. Exclusive of the deceased no one was injured. That fact is important because it directs attention to the question why, of at least three men exposed to exactly the same risk, was only one injured?

The answer to that question is, of course, that the risk, if any, to which the transportation itself exposed these men did not cause deceased's injuries. The central fact from which flowed the tragic consequences giving rise to this controversy is the fact of deceased's intoxication. When the deceased persisted in standing in the body of the truck (testimony of Ray Johnston, R. 39; testimony of James F. Brown, R. 52), and when the deceased said, "Let's get out and walk" and stepped out of the moving truck (testimony of Ray Johnston, R. 39), he completely departed from the course of his employment and exposed himself to a grave peril which not only was not involved in or incidental to his employment but was the immediate and inevitable result of his departure from his employment.

In determining whether a servant's acts are for the purpose of serving the master or are such as to constitute a deviation from the course of his employment

"It is the state of the servant's mind which is material. Its external manifestations are important only as evidence. The act is within the scope of employment only if the servant is actuated to some extent by an intent to serve his master. However, it is only from the manifestations of the servant and the circumstances that, ordinarily, his intent can be determined."

Restatement of Agency, Sec. 235.

In *Morgan v. Hoague* (App. D.C.) 72 F.(2d) 727, it is said:

"In order to determine whether the injury in this case arose 'in the course of' the deceased's employment, reference must be had to the time,

place, and circumstance under which the injury occurred."

Morgan v. Hoague (App. D.C.) 72 F.(2d) 727.

That the deviation from the course of the employment may be simultaneous with the casualty is clearly established by the decision of the Fifth Circuit Court of Appeals in *Hundley v. Hartford Accident Company*, 87 F.(2d) 416, in which case an oil company distributor bought an airplane which he intended to use both for his own pleasure and on company business. One Sunday morning he went out to the airport to endeavor to sell his company's gasoline to the manager. He entered the hangar where his plane was housed to watch two men polish his plane. He decided to help them, by using a mechanical buffer. While he was trying to clean this buffer with gasoline, it exploded, fatally burning him. *The court said that the deviation from his employment occurred when Hundley took hold of the buffer.*

The Restatement of Agency, Sec. 235, also contains this language:

"The fact that an act is done in an outrageous or abnormal manner has value in indicating that the servant is not actuated by an intent to perform the employer's business."

Restatement of Agency, Sec. 235.

Application of these principles to the facts in this case is a simple and conclusive exercise. Assuming that deceased was in the course of his employment at the beginning of the ride during which he met his death, we find it established by this record that shortly before

he met his death he stood up in the truck while the truck was passing over rough road, and said "he saw a moose down there" and said, "lets go get it" (testimony of Ray Johnston (R. 39); testimony of James F. Brown (R. 52)). If there was nothing else in this record regarding the matter of deviation, it seems that any reasonable mind must conclude that when the deceased, who had ridden with complete safety for several miles while seated in the bed of the truck, stood up in the truck on a rough road, stated that there was a moose out there and invited his companions to join him in going to get it, he committed a complete deviation from the course of his employment, for the consequences of which the employer cannot fairly be held responsible. When to those facts is added the testimony of Ray Johnston that deceased voluntarily stepped out of the moving truck and the physical facts which have been accepted by the Commissioner as true, it seems to appellants that the conclusion must be inescapable that deceased's departure from the truck could not have occurred in the course of his employment.

The clear common sense of the situation disclosed by this record is that the deceased, who had only to remain seated in the truck in order to remain in the course of his employment as well as in complete safety, acted in the outrageous manner in which he did act simply and solely by reason of his intoxication which has been found as a fact by the Commissioner; that by reason of his stimulated condition he became oblivious to the danger of his situation and, ignoring it, acted in such a manner as to bring about his own death.

Assigned errors Nos. (3) and (4):

(3) The court erred in granting the motion of respondent C. M. Whipple to dismiss the libel of libellants herein; and in failing to deny said motion (R. 115, 116).

(4) The court erred in entering the order or final decree on November 21, 1945, granting said motion to dismiss and dismissing said libel (R. 116).

In support of their assignments of error (3) and (4) appellants adopt by reference their argument in support of their assignments of error (1) and (2).

It would seem necessarily to follow that if this court decides favorably to appellants the questions raised by appellants in either assigned error (1) or assigned error (2), this court must decide favorably to appellants the questions raised by assigned errors (3) and (4).

Respectfully submitted,

MERRITT, SUMMERS, BUCEY & STAFFORD,
MATTHEW STAFFORD

G. H. BUCEY

Proctors for Appellants.